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No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ILLINOIS PRO-LIFE COALITION, INC., III,

Petitioner,

v.

LOUIS G. KEITH, M.D., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED*

When an organization was the principal proponent of a statute that furthers the purposes for which the organization was formed, including the protection of unborn and newly born children and promotion of the availability of children for adoption by its members, does that organization have a right to intervene under Fed. R. Civ. P. 24(a)(2) in a suit brought to invalidate that statute?

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*Illinois Pro-Life Coalition, III, Inc., is a proposed intervenor-defendant. The remaining parties to this proceeding are as follows. Plaintiffs: Louis G. Keith, M.D.; David Zbaraz, M.D.; William Spellacy, M.D.; and Arthur L. Herbst, M.D.; on behalf of all others similarly situated and on behalf of their women patients. Defendants: Richard M. Daley, State's Attorney for Cook County; Neil F. Hartigan, Attorney General of the State of Illinois, and Fred H. Uhlig, Acting Director of Public Health, State of Illinois.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Illinois Pro-Life Coalition, III, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States court of Appeals for the Seventh Circuit, entered in this proceeding on June 18, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial of petitioner's Motion to Intervene, is reported at 764 F.2d 1265 (7th Cir. 1985), and reproduced in the Appendix to this Petition at App.1. The opinion of the United States District Court for the Northern District of Illinois is not reported, but is reproduced in the Appendix to this Petition at App.33.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 18, 1985, affirming the judgment of the United States District Court for the Northern District of Illinois, denying petitioner's Motion to Intervene, entered on September 28, 1984. The jurisdiction of this Court is

invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 24(a):

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute of the U. S. confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

On June 30, 1984, the Illinois General Assembly enacted, over gubernatorial veto, House Bill 1399 which amended the Illinois Abortion Law of 1975. HB 1399 repealed a number of prior provisions and streamlined the language of several others in response to this Court's decision in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). New standards of care to be taken during abortions performed on fetuses who have a reasonable possibility of sustained survival outside the womb were established. In addition to other provisions, HB 1399 also required the presence of a second physician when abortions are performed after viability to care for the infant who survives an abortion, and prohibited the intentional killing of infants who survive abortions.

These provisions were designed to increase the chances of survival: 1) for unborn children when late term abortions are performed upon them; and 2) for newly born children who survive abortions and are in need of immediate medical care.

Illinois Pro-Life Coalition, III (IPC) is a not-for-profit corporation whose By-Laws provide that it is organized: 1) to promote the basic human right to life through formulating, supporting, and lobbying for legislation that provides protection for unborn children, and 2) to present alternatives to abortion and infanticide by supporting groups and individuals that offer such alternatives.

A number of IPC's members are parents of adopted children who seek to adopt other children and stand ready to adopt children who survive abortions,

including those who are handicapped. Affidavits of Nancy Coughlin, App. at 44, Ralph Rivera, App. at 47, Joan Solms, App. at 50, and Kathy Coughlin, App. at 53.

IPC championed HB 1399 throughout its consideration by the Illinois General Assembly. It prepared and distributed a detailed constitutional analysis of the bill to all legislators prior to its enactment and funded and carried out an intensive lobbying effort in its favor.

The ACLU, which had solicited abortion-performing doctors to attack the bill, sought and secured an emergency TRO on Sunday, July 1, 1984. On July 2, 1984, a complaint initiating a class action lawsuit seeking declaratory and injunctive relief against HB 1399 was filed pursuant to 28 U.S.C. §§1331, 1343 (1982). The named defendants were Richard M. Daley, Cook County State's

Attorney, Neil F. Hartigan, Attorney General of Illinois, and Fred H. Uhlig, Acting Director of the Illinois Department of Public Health.

With the agreement of the Attorney General, the temporary restraining order entered on July 1st was extended until July 12, 1984. With the consent of all defendants it was extended on July 6 to July 26; on July 26 to September 28; and on September 28 until further notice of the court.

On August 16, 1984, IPC, represented by Americans United for Life Legal Defense Fund (AUL), moved to intervene, both as of right and permissibly, as a defendant in this action. IPC claimed an interest in defending HB 1399 by virtue of its intensive lobbying efforts in favor of that bill; the fact that IPC's very reason for existing was intertwined

with the promotion of the interests protected by the bill; and the fact that its members who wished to adopt children stood to benefit from the operation of the bill. That motion was opposed by the doctors who had filed suit but supported by both Attorney General Hartigan and State's Attorney Daley. After briefing and a short oral statement by each party, the district court denied the motion on September 28, 1984 without written opinion. See transcript of oral opinion App. at 33.

IPC filed a timely notice of appeal from the denial of intervention on October 29, 1984. Oral argument before the Seventh Circuit Court of Appeals was heard on April 11, 1985 and the Court of Appeals rendered its decision affirming the denial of intervention on June 18, 1985. IPC is seeking review of that

decision with this petition for certiorari.

The current procedural posture of the case before the district court is as follows: More than a year after this litigation was begun, the law remains under a temporary restraining order without ever having had a preliminary hearing of the likelihood of success on the merits. Although cross motions for summary judgment were filed early in 1985, no ruling was made on those motions and the case has now been stayed by the district court pending this Court's decisions in Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), prob. juris. noted, Diamond v. Charles, No. 84-1379, 53 U.S.L.W. 3824 (May 20, 1985), and Thornburgh v. A.C.O.G., 737 F.2d 283 (3d Cir. 1984), prob. juris. noted, No. 84-495, 53 U.S.L.W. 3739.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

Cases are best decided when they come before the federal courts with "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." United States Parole Commission v. Geraghty, 445 U.S. 388, 403 (1980).

In private litigation, each of the parties is, of course, generally eager to vigorously advocate his position and thereby preserve the adversary relationship necessary for proper dispute resolution. In public law litigation, however, where statutes are challenged, the governmental parties charged with defending those statutes are not usually "self-interested" and may not be inclined to "vigorously" defend the statute. This

is particularly true where controversial statutes are involved. In order to preserve a truly adversary relationship between the parties in such cases, federal courts must allow those most interested in vigorously defending the statute to intervene.

This lawsuit, involving as it does one of the most pressing and controversial public policy issues of our time, is an archetype of public law litigation. One of the principal contenders in the struggle--the American Civil Liberties Union--is in court as the representative of abortion-performing doctors arguing that the newly enacted abortion law is facially invalid. The other principal contender--IPC--which provided each legislator with a detailed constitutional analysis of the bill prior to enactment and lobbied extensively in its favor, has

sought to intervene in order to defend the law but has been denied the right to do so. Thus, the honed advocacy and comprehensive factual record that only a clash between two equally committed and knowledgeable opponents can provide has been eliminated from this litigation.

Both Attorney General Hartigan and State's Attorney Daley, the named defendants in this case, have stated that they would welcome IPC's intervention, citing the special expertise of IPC and its counsel Americans United for Life Legal Defense Fund.* They acknowledge that they cannot match the thorough knowledge of the subject area held by the proposed intervenor. Moreover, both defendants are elected officials who seemingly prefer to keep a low profile in

*AUL Legal Defense Fund has been engaged in abortion litigation for approxiamtely ten years.

abortion cases.* The political nature of their office, the volatility of the abortion issue, and the complexity of the constitutional issues involved may make them unable or unwilling to vigorously and adequately defend the statute as IPC is prepared to do. These special concerns which are often present in public law cases but not in private disputes, demand that the two types of litigation be treated differently.

This Court and a number of the Circuit Courts have recognized the important distinctions between public and

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*For example, in Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), prob. juris. noted, Diamond v. Charles, No. 84-1379, 53 U.S.L.W. 3824 (Maay 20, 1985), both named defendants chose to adopt the briefs of the pro-life Intervenors rather than file briefs of their own. Oral argument before the Court of Appeals was presented by the Intervenor on behalf of all parties, and the appeal to this Court was taken by the Intervenor.

private law cases and have allowed broader intervention in the former. The Seventh Circuit has erred in failing to adhere to the applicable precedent of this Court. Its decision is also in conflict with those of other Circuits.

Certiorari should be granted in this case to clarify and enforce the above principles so that true adversary relationships, with their concomitant benefits, will be secured in public as well as private law cases. Opposition to IPC's intervention amounts only to a desire to avoid a vigorous defense of the challenged law.* Justice is not served by excluding obviously interested parties

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*IPC is the sole applicant for intervention in this case and manageability of the litigation is not in question. Also, as the State has indicated, the presence of IPC with its special expertise will undoubtedly expedite the proceedings and aid in the proper resolution of these issues.

from assisting in the defense of laws with which they are intimately familiar and expertly able to defend in a truly adversarial manner.

II THE COURT OF APPEALS' DENIAL OF INTERVENTION TO IPC IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND THE DECISIONS OF THE MAJORITY OF OTHER CIRCUITS WHICH ALLOW LIBERAL INTERVENTION IN PUBLIC LAW CASES.

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that upon timely application to intervene, an applicant is entitled to intervene as a matter of right

> when the applicant claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Court of Appeals acknowledged that the timeliness requirement of Rule 24 was met by IPC. However, the majority of the

court held that IPC lacked sufficient interest in the litigation to support its intervention. App. at 8. Although Judge Cudahy disagreed with the majority concerning the adequacy of IPC's interest, he concurred in the majority's holding because he felt that the existing defendants provided adequate representation. App. at 30-31.

In denying intervention, the Court of Appeals adopted an extremely narrow interpretation of Rule 24(a)(2) which is contrary to the intent of the 1966 amendments to Rule 24, the prior decisions of this Court, and the decisions of a majority of the other Circuit Courts of Appeal. Under those decisions, IPC would be entitled to intervene as of right. The Seventh Circuit's holding should be reversed and the case remanded with directions to

allow intervention pursuant to Rule 24(a)(2).

A. The "Interest" Factor Was Intended to Be Broadly Construed in Public Law Cases And the Court of Appeals Erred in Failing to So Construe It.

1. The decisions of this Court and the majority of the Cirucits broadly construe "interest."

This Court has acknowledged that the 1966 amendments to Rule 24 were intended to broaden the kinds of interests cognizable as a basis for intervention as of right.* Cascade Nat. Gas v. El Paso

*The Court noted that the amendments were meant to be "a kind of counterpart to Rule 19(a)(2(i) on joinder of persons needed for a just adjudication." 386 U.S. at 134 n.3. The language of that Rule is quite similar to that of Rule 24(a)(2) and the Advisory Committee notes are, likewise, broad stating: "Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made."

Nat. Gas, 386 U.S. 129 (1967). In Cascade, an action brought to protect the public interest in a competitive system, the Court allowed two applicants for intervention, California and Southern California Edison, to intervene as of right. The Court held that they had a sufficient interest in the divestiture plan at issue to intervene because that plan was designed to protect their interests, "as part of the public interest in a competitive system." Moreover, a merger that reduced the competitive factor in natural gas availability could adversely affect that interest. Id. at 135.*

The Court noted that the 1966 amendments to Rule 24 require only that

*These applicants were allowed to intervene under prior Rule 24(a)(3) which had more stringent requirements than the amended versions presently contained in Rule 24(a)(2).

an applicant have "'an interest' in the 'transaction which is the subject of the action.'" Id.* Accordingly, the Court also allowed Cascade Natural Gas, a distributor of natural gas in Oregon and Washington, to intervene as of right. Id. Since the new company formed under the divestiture plan would be a supplier of Cascade, and Cascade would benefit from the operation of the plan, the Court held that it had a sufficient interest in the subject matter in dispute.

The majority of the circuits have followed this Court's lead in broadly construing "interest" in public law cases where laws are designed to protect the

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*See also, Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) ("the recent amendments to the civil rules [indicate] that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency an due process.").

interests of the applicant.

They have generally held that when the issue in the underlying litigation is very narrow, the proposed intervenor's interest must, of necessity, be narrowly tailored so that it can fairly be said to be affected by the outcome of the litigation. On the other hand, when the issue in the underlying litigation is broad, as is the case when issues of public law are presented, proposed intervenors with correspondingly broader interests have been permitted to intervene.

Three recent decisions of the Ninth Circuit, involving intervention situations closely analogous to that presented here, aptly illustrate this principle. In Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980), the court held that the National Organization for Women (NOW) had

the necessary interest to intervene as of right in a suit challenging the procedures for ratification of the proposed Equal Rights Amendment. The court stated that because NOW had championed the cause, it had "an interest in the continued vitality of the Equal Rights Amendment." Id. at 887. Similarly, Don't Waste Washington, Inc. (DWW), a public interest group that sponsored a state initiative restricting importation of nuclear waste, was held to be entitled to defendant intervenor status as of right in a challenge brought against the statute. Washington State Bldg. and Constr. Trades Comm'n v. Spellman, 684 F.2d 627 (9th Cir. 1982). In holding that DWW's interest as a sponsor of the legislation was sufficient to support intervention, the court noted that "Rule 24 traditionally has

received a liberal construction in favor of applicants for intervention." Id. at 630, citing 7A C. Wright & A. Miller, Federal Practice and Procedure §1904 (1974). In Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983), plaintiffs challenged the establishment, by the Secretary of the Interior, of a Birds of Prey Conservation Area. The National Audubon Society and several of its local chapters sought to intervene on behalf of the Secretary, on the grounds that they had supported creation of the preserve. The court found that despite the fact that the Society had no proprietary interest in the land in question, it nevertheless had a protectable interest in the preservation of birds and their habitats that was sufficient to support its intervention as of right.

The Second Circuit has also adopted this broad approach to what constitutes a sufficient "interest" in public law cases. The Pharmaceutical Society of the State of New York, Inc. was held to have a sufficient interest to support its intervention in an action to enjoin enforcement of a state regulation prohibiting advertising the price of prescription drugs. New York Pub. Interest Research Group v. Regents of University of State of New York, 516 F.2d 350 (2d Cir. 1975). The court stated:

> With respect to the association of pharmacists, we hold that it has a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged.

Id. at 352.

The Court of Appeals for the District of Columbia has also taken this position. In Natural Resources Defense Council v. Costle, 561 F.2d 904, 909

(D.C.Cir. 1977), the court held that the proposed intervenors' "interest in the promulgation of valid regulations" by the Environmental Protection Agency was sufficient to support their intervention of right under Rule 24(a)(2).

In Planned Parenthood v. Citizens for Comm. Action, 558 F.2d 861, 869 (8th Cir. 1977), a community organization was formed "to preserve property values and insure that abortion facilities do not affect the health, welfare and safety of citizens." The Eighth Circuit held that the organization had sufficient interest in a suit challenging the constitutionality of an ordinance concerning abortion clinics to support its intervention as a defendant under Rule 24(a)(2). Id.

A parallel stance was taken by the Tenth Circuit in National Farm Lines v. I.C.C., 564 F.2d 381 (10th Cir. 1977),

where the National Motor Freight Traffic Association sought intervention of right in a suit challenging the constitutionality of certain statutes and regulations promulgated under the Interstate Commerce Act. The challenged statutes benefited members of the Association and they claimed an interest in having them upheld. The court of appeals agreed that this interest was sufficient to support intervention of right. Id. at 382.

The Fifth Circuit, in New Orleans Public Serivce v. United Gas Pipe Line, 732 F.2d 452, 464-465 (5th Cir. 1984), citing Data Processing Service v. Camp, 397 U.S. 150, 153 (1970), has also noted that in public law cases where statutory or constitutional violations are asserted, interest in the subject matter of the litigation depends upon the "zone of interests to be protected or regulated by

the statute or constitutional guarantee in question." The court continued "in a sense, a party within a zone of interests protected by a statute may possess a type of substantive right not to have the statute violated." See also Avery v. Heckler, 584 F.Supp. 312, 316 (D.Mass. 1984) (intervenor's interest fell within "zone of interests" protected by legislation; therefore, intervention was allowed to defend statute against constitutional challenge).

The Seventh Circuit's narrow construction of "interest" to mean that "[a] proposed intervenor must demonstrate a direct, significant and legally protectable interest in the property at issue in the lawsuit," App. at 8, is in conflict with the language and intent of Rule 24, this Court's holding in Cascade and the holdings of the Courts of Appeals

set forth above. It does not further any legitimate interest and serves only to eliminate an interested and expert party from this litigation. It should be reversed.

2. IPC Asserts an Interest in the Challenged Statute Sufficient to Meet the Requirments of Rule 24(a)(2) When "Interest" Is Broadly Construed.

IPC has a significantly protectable interest in the fate of HB 1399 which is to be determined by this lawsuit.

Article II of IPC's By-Laws states that the corporation is organized to promote the basic human right to life through formulating, supporting, and lobbying for legislation that provides protection for unborn children and to present alternatives to abortion and infanticide by supporting groups and individuals that offer such alternatives. IPC asserts an interest in the protection

of unborn and newly born children and the protection of its members' interests in adopting children who survive abortions.

HB 1399 was designed to further those interests which IPC seeks to protect through its intervention. Both IPC and its members are benefitted by the operation of HB 1399. If the law is upheld, more babies will survive abortions and be available for adoption. If the law is enjoined, fewer babies will survive and, therefore, fewer will be available for adoption. Thus, both sets of the interests IPC advances will be directly affected by this litigation.

The substantiality of IPC's interest in HB 1399 is underscored by the fact that IPC championed that bill since its introduction in the Illinois state legislature. It prepared and distributed a detailed constitutional analysis of the

bill to all state legislators. It funded and carried out an intensive lobbying campaign both for the original passage of the bill and later for the override of the governor's veto. Thus, IPC has a demonstrated interest in the bill which is now challenged. Indeed, IPC's very existence is intertwined with its ability to promote this type of legislation and to ensure that such laws are adequately defended if challenged.

Under this Court's decision in Cascade and those of the Courts of Appeals set forth above, IPC has a sufficient interest to intervene in this case.*

*Since the resolution of the issues in this case will determine whether added protections for unborn children will be available, the potential impairment to IPC's interests by an unfavorable decision is readily apparent. Should a permanent injunction issue against HB 1399, IPC's interest in protecting unborn and newly born children through that legislation would be severely impaired. Furthermore, since the injunction would be based on

B. The Burden of Showing that Representation May Be Inadequate Is Minimal And the Seventh Cirucit Erred in Failing to So Hold.

1. This Court's decision in Trbovich which has been followed by a majority of the Circuits requires only a minimal showing of inadequate representation.

The standard for determining whether an intervenor's interest is adequately represented by existing parties to the lawsuit was set forth by this Court in Trbovich v. United Mine Workers, 404 U.S. 528 (1972). The Court stated that while the applicant for intervention has the burden of showing "that representation of

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[footnote con'd from previous page]

constitutional grounds, ability to seek similar legislation from the legislature in the future would be severely impaired. Thus, IPC would be unable to protect its interests through future legislation or litigation. The unavailability of other proceedings supports IPC's case for intervention since IPC's participation here represents its only opportunity to protect its interests.

his interest 'may be' inadequate, [] the burden of making that showing should be treated as minimal." Id. at 538 n.10.

The issue in Trbovich was whether a union member who filed the initial complaint with the Secretary of Labor could intervene in a suit initiated by the Secretary on his behalf. Two claims were made by the Secretary in opposition to the union member's intervention: 1) that he was barred by statute from intervening because the right to bring suit for violations of union election laws rested solely with the Secretary, and 2) that he could not intervene because his interest in proper election procedures was already adequately represented by the Secretary. Id. at 538-39.

The Secretary claimed that the proposed intervenor's "only legally

cognizable interest" was a generalized interest of "all union members in democratic elections," and that that interest was identical to the government's interest. Id. at 538. Thus, the Secretary claimed that its ultimate goal--to make sure that union elections were conducted in a democratic manner--was the same as proposed intervenor's and that representation was therefore, adequate, unless the Supreme Court was prepared to find that the Secretary had failed to perform his duty.

The Court rejected these contentions stating that the Secretary had a duty to serve two distinct interests which were related, but not identical. It noted that the Secretary had a duty: 1) to represent the right of individual union members to have union elections conducted

in accordance with the Labor-Management Reporting and Disclosure Act, and 2) to protect the broader "public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union members." Id. at 539. The Court held that the intervenor had met his minimal burden of showing inadequacy of representation because the Secretary's duty to serve these two distinct interests "may not always dictate precisely the same approach to the conduct of the litigation." Id.

Under Trbovich, then, the inadequacy of representation requirement can be met by showing that the interests of the existing party and those of the applicant are not identical.

Other circuits that have applied Trbovich have adopted a similar approach

to the adequacy of representation requirement of Rule 24(a)(2). See, e.g., Natural Resources Defense Council v. Costle, 561 F.2d at 912 n.41 ("representation may not be adequate when the parties have different scopes to their interest, i.e., when their 'interests may not coinicde.'") (emphasis in original); New York Pub. Interest Research Group v. Regents, 516 F.2d at 352 (intervention allowed even though government party clearly shared the interest of pharmaceutical association in sustaining state regulation because intervenor was likely to "make a more vigorous presentation" of certain aspects of the argument); Planned Parenthood v. Citizens for Com. Action, 558 F.2d at 870 (organization granted intervention even though "both the applicants and [government] defendants are interested in

upholding the constitutionality of the ordinance [because] their respective interests, while not adverse, are disparate."); Metroplitan Life Ins. Co. v. Ditmore, 729 F.2d 1, 9 (1st Cir. 1984) (intervention would be appropriate because it was "fair to assume that the present defendants' interests do not necessarily coincide with those of the absent parties"); Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1133, 1135 (3d Cir. 1982), citing National Farm Lines v. ICC, 564 F.2d 381 (10th Cir. 1977) (applicant may demonstrate that its interests, though similar to those of an existing party, are nevetheless sufficiently different so that existing party's representation may not give applicant's interest proper attention); County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) (adequacy of representation is

met if: 1) existing party "will undoubtedly make all of the intervenor's aguments" and is capable of and willing to make such arguments," and 2) "intervenor would not offer any necessary element to the proceedings that the other parties would neglect.").

In holding that the existing parties to this litigation were adequately representting IPC's interests, the Seventh Circuit stated:

> Adequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intevenor.

App. at 19-20. The presumption of adequacy relied upon by the Seventh Circuit, however, is in conflict with the minimal burden test of Trbovich and the other circuit cases cited above. Indeed, this Court rejected that presumption in Trbovich where the Secretary of Labor was

the existing party and he argued that adequacy of representation should be presumed unless there was evidence of failure to perform his duty. Although IPC set forth the minimal burden test of Trbovich and relied upon it, the Seventh Circuit failed to even address that case, let alone attempt to distinguish it.

2. Without intervention, IPC's interests may not be adequately represented because they are different in scope from those of existing parties, and special knowledge and expertise will not be available to represent these interests.

The fact that the Attorney General and the State's Attorney support IPC's intervention because of its special expertise and that of its counsel AUL* indicates that they themselves feel that

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*Counsel for Petitioner has frequently represented intervening defendants in the litigation concerning the constitutionality of statutes pertaining to abortion. Charles v. Daley, supra, prob. juris. noted, Diamond

the defense of this statute would be more complete if IPC were present as a party.

The Illinois Abortion Law secures certain rights for unborn and newly born children and benefits prospective adoptive parents. IPC, which was organized for the specific purpose of representing the interests of unborn and newly born children, has sought to intervene so that its narrower interests on their behalf and on behalf of its own members who would adopt aborted children will be vigorously protected.

While Attorney General Hartigan and State's Attorney Daley are statutorily

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[footnote con'd from previous page]

v. Charles, No. 84-1379, 53 U.S.L.W. 3824 (May 20, 1985); Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Planned Parenthood Association-Chicago Area v. Kempiners, 700 F.2d 1115 (7th Cir. 1983); Wynn v. Carey (II), 599 F.2d 193 (7th Cir. 1979); and Wynn v. Carey (I), 582 F.2d 1375 (7th Cir. 1978).

required to represent the people of the state in cases in which the people are interested, neither state defendant has a duty to represent IPC's narrower interests in having HB 1399 upheld.* Just as the union member in Trbovich may have had a valid complaint about his governmental "lawyer," the unborn, newly born and

*In addition to its general duty to defend the public interest, the Attorney General also has a duty to defend actions against "any state officer." Ill.Rev. Stat. ch. 14, §4. Thus, the Attorney General is also charged with defending Mr. Uhlig, the Acting Director of the Department of Public Health, in this action. Mr. Uhlig was appointed by Governor Thompson and must report to him. Ill.Rev.Stat. ch. 127 §§12, 25 (1983). In light of Governor Thompson's veto of HB 1399 it is possible that Mr. Uhlig, as Attorney General Hartigan's client, may not be interested in having his attorney aggressively defend the provisions of HB 1399 that impose additional duties on him. Therefore, representation may also be inadequate because these different and perhaps conflicting interests of the state defendant, "may not always dictate precisely the same approach to the conduct of the litigation." Trbovich, 404 U.S. at 539.

prospective adoptive parents whose interests are represented by IPC have a legitimate interest in securing a lawyer other than the government--especially one that has approximately ten years of expertise in the area of abortion litigation. Such representation will ensure that a truly adversary relationship is preserved throughout this litigation.

Conclusion

The standards adopted by the Seventh Circuit in denying intervention to petitioner are in conflict with the decisions of this Court and the majority of the Circuits. The petition for certiorari should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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*Counsel of Record

September 16, 1985

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2860

Louis G. KEITH, M.D., et al.,
Plaintiffs-Appellees,

v.

Richard M. DALEY, State's Attorney for the County of Cook, Neil F. Hartigan, Attorney General of the State of Illinois and Fred H. Uhlig, Acting Director of Public Health of Illinois,
Defendants,

and

Illinois Pro-Life Coalition, Inc., III,
Intervening Defendant-Appellant.

Argued April 11, 1985
Decided June 18, 1985

Before BAUER and CUDAHY, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

BAUER, Circuit Judge.

The Illinois Pro-Life Coalition (IPC), a state lobbying organization, seeks to intervene in a suit brought by a group of physicians who perform abortions and challenging the constitutionality of an Illinois statute regulating abortion.

The district court denied IPC leave to intervene as a matter of right. The district court also denied IPC's motion for permissive intervention. We affirm both decisions of the district court.

I.

On June 30, 1984, the Illinois General Assembly enacted, over gubernatorial veto, House Bill 1399 (HB 1399), further amending the Illinois Abortion Law of 1975. On July 1, 1984, plaintiff physicians filed a class action lawsuit seeking a declaratory judgment that HB 1399 violated the United States Constitution and a permanent injunction prohibiting the State of Illinois from enforcing any of its provisions. Named as defendants were Illinois Attorney General Neil F. Hartigan, Acting Director of the Illinois Department of Public Health, Fred H. Uhlig, and Richard M.

Daley, in his capacity as Cook County State's Attorney and as a representative of a proposed defendant class of all Illinois state's attorneys. Plaintiffs allege that HB 1399 violates a woman's right of privacy and violates their right to practice medicine. Plaintiffs allege that certain of the challenged subsections are identical to sections held unconstitutional in Charles v. Carey, 579 F.Supp. 464 (N.D.Ill. 1983), aff'd, 749 F.2d 452, 461-62 (7th Cir. 1984). Plaintiffs also challenge sections of HB 1399 which inter alia, declare, that human life begins at conception, Section 2(6), require physicians to elevate fetal life above that of a pregnant woman, Section 6(1), require physicians to use "life-saving" abortion techniques on non-viable fetuses, Section 6(4), subject physicians to prosecution under the homicide laws

for aborting nonviable fetuses, Section 6(3), and require physicians to inform their patients about "fetal pain." Section 6(6).

Illinois Pro-Life Coalition is a not-for-profit organization incorporated in Illinois in 1980. IPC's bylaws provide that its purposes include the promotion of the basic human right to life, specifically for unborn children, and the presentation and support of alternatives to abortion. IPC championed HB 1399 throughout its consideration by the Illinois state legislature. IPC lobbied for the original bill and against the governor's veto, and distributed a detailed constitutional analysis of the bill. IPC supported HB 1399's new standards of care to improve the likelihood of abortion survival for viable fetuses, Section 6(1), and for

fetuses for whom "there is a reasonable possibility of sustained survival . . . outside the womb," Section 6(4), as well as its requirement that second physicians be present when abortions are done after viability. Section 6(2).

On August 16, 1984, IPC moved to intervene as a defendant in this case. IPC asserted as interests of its members the intensive lobbying for abortion alternatives and fetal protections in which IPC has been engaged and the willingness of its members to adopt fetuses which have survived abortions. Americans United for Life Legal Defense Fund, counsel for IPC, also asserted its frequent representation of intervenors in other lawsuits relating to the constitutionality of abortion, including Williams v. Zbaraz, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980), Harris v. McRae,

448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), Charles v. Daley, 749 F.2d 452 (7th Cir. 1984); Planned Parenthood Association-Chicago Area v. Kempiners, 700 F.2d 1115 (7th Cir. 1983); Wynn v. Carey (II), 599 F.2d 193 (7th Cir. 1979), and Wynn v. Carey (I), 582 F.2d 1375 (7th Cir. 1978). After the matter was briefed and after oral argument, the district court denied the motion without a written opinion on September 28, 1984. The court did grant IPC leave to participate as amcius curiae stating that it would carefully consider "any briefs filed by IPC."

II

The Federal Rules of Civil Procedure set forth four requirements which a proposed intervenor must satisfy before intervention of right is allowed: (1)

the application must be timely; (2) the applicant must have a direct and substantial interest in the subject matter of the litigation, (3) the applicant's interest must be impaired by disposition of the action without the applicant's involvement; and (4) the applicant's interest must not be represented adequately by one of the existing parties to the action. Fed.R. Civ.P. 24(a)(2); United States v. 36.96 Acres of Land, 754 F.2d 855, 858 (7th Cir. 1985). The applicant has the burden of proving each of the four elements of intervention as of right; the lack of one element requires that the motion to intervene be denied. 36.96 Acres, 754 F.2d at 858; CFTC v. Heritage Capital Advisory Services, Ltd., 736 F.2d 384, 386 (7th Cir. 1984). Plaintiffs conceded that the defendants had filed their

motion to intervene in a timely fashion and the district court gave no indication that IPC had failed to meet the timeliness requirement. We hold, however, that IPC lacks the direct interest required to support intervention as of right and we will discuss only this criteria. Because the four requirements, however, are facets of the same problem, 3B Moore's Federal Practice, ¶24.07[1] at 24-51, some of our analysis will refer to the other factors of impairment and representation.

A proposed intervenor must demonstrate a direct, significant and legally protectable interest in the property at issue in the law suit. The interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit. Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir.

1982). The interest must be so direct that the applicant would have "a right to maintain a claim for the relief sought." Heyman v. Exchange National Bank of Chicago, 615 F.2d 1190, 1193 (7th Cir. 1980).

IPC first asserts that the "interest" factor must be broadly construed in public law cases where public interest organizations seek intervention. IPC asserts that this court supported a more liberal reading of public law intervention requirements in United States v. Board of Sch. Com'rs, Indianapolis, Inc., 466 F.2d 573 (7th Cir. 1972). IPC also relies on several commentators who assert that the "complexity and multiplicity of interests in modern claims for relief" require "liberalized intervention practices." IPC Brief at 5, citing Albert, Standing to Challenge Administra-

tive Action An Inadequate Surrogate for Claim to Relief, 83 Yale L.J. 425, 484 & n.285 (1974); Bremet, A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 Ga.L.Rev. 701 (1982); Weinstein, Litigation Seeking Changes in Public Behavior & Institutions--Some Views on Participation, 13 U.Cal.Davis L.Rev. 231 (1980).

We do not believe that Indianapolis supports a broad interpretation of the interest factor in public law cases. In Indianapolis, Citizens of Indianapolis for Quality Schools (CIQS) moved to intervene as a party defendant on behalf of all students in the Indianapolis Public Schools in a lawsuit brought by the United States charging the Board of School Commissioners for the City of Indianapolis with racial discrimination in

the assignment of faculty and students. This court recognized that "all students . . . have an interest in a sound educational system in accordance with the law," id. at 575, but affirmed the district court's denial of intervention as of right and held that the district court had not abused its discretion by denying permissive intervention. Id. at 576. This court vacated the district court's order and remanded only for consideration of the appropriateness of intervention in other expanded parts of the litigation. Later desegregation cases have reaffirmed that a generalized interest in a "sound educational system" is not enough to establish intervention as of right. See, e.g., Brookins v. South Bend Community School Corp., 710 F.2d 394 (7th Cir. 1983); United States v. South Bend Community School Corp., 692

F.2d 623 (7th Cir. 1982).

Contrary, therefore, to IPC's arguments, no special broad definition of "interest" applies to suits involving "public law" cases in this circuit. Intervention as of right requires a direct and substantial interest. IPC asserts that its interests as a lobbyist support its intervention as of right, arguing that its "very existence is intertwined with its ability to promote this type of legislation and to insure that such laws are adequately defended if challenged." IPC Br. at 15. IPC also asserts an interest in the protection of the unborn and its members' interest in adopting children who survive abortions. None of the three particular interests asserted by IPC meet the "direct and substantial interest" test.

IPC's interest as chief lobbyist in the

Illinois legislature in favor of HB 1399 is not a direct and substantial interest sufficient to support intervention in the instant lawsuit. In Wade v. Goldschmidt, 673 F.2d 182 (7th Cir. 1982), this court concluded that the status of lobbyist did not alone create a direct and substantial interest sufficient to support intervention as of right. The intervenors in Wade, a lobbyist group in support of the construction of a bridge, whose construction the Wade plaintiffs had challenged, asserted generalized economic, personal and environmental interests in the bridge. This court denied intervention, stating that in a suit such as this,

> brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. . . . We hold that the proposed intervenors' interests do not relate 'to the subject of the action' and they have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention as a right.

Id. at 185.

Similarily, in this case, the governmental bodies charged with compliance can be the only defendants. Plaintiffs initiated this lawsuit to protect their constitutional rights which they allege would be violated by the restrictions HB 1399 places upon physicians who perform abortions. Only the defendant Attorney General and the defendant Cook County State's Attorney are required to defend and enforce the law of the state of Illinois, including HB 1399.

More recently, this court also rejected another lobbyist's petition for intervention. In United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), the United States instituted a condemnation action against the Northern Indiana Public Service Company (NIPSCO)

to acquire Crescent Dune, part of the Indiana Dunes National Lakeshore. The Indiana Dunes National Lakeshore Act, 16 U.S.C. §460u-12, authorized the United States to acquire Crescent Dune. Four years after the United States had filed suit, the Save the Dunes Council moved to intervene. The Save the Dunes Council, a not-for-profit corporation, had "lobbied hard for the passage of the 1976 amendments to the Indiana Dunes Act which authorized acquisition of Crescent Dune, and prepared the base map used to determine the official boundary information for the 1976 amendments." 36.96 Acres, 754 F.2d at 857. The district court denied the Council's motion to intervene and this court affirmed.

This court found that the Council possessed neither of the two interests considered in an eminent domain pro-

ceeding: the power of the sovereign to exercise eminent domain and the interest through private ownership of the condemned property. While recognizing that "the council has played a laudatory role in the development of the Indiana Dunes," 36.96 Acres, 754 F.2d at 859, this court found that only the Secretary has the authority to condemn Crescent Dune and only NIPSCO could claim ownership of the property. 36.96 Acres, 754 F.2d at 858. This court concluded, therefore, citing Wade, that "[w]hile the Council's aesthetic and environmental interest in Crescent Dune may indeed be legitimate and demonstrable, we cannot say that it is direct, substantial or legally protectable. Therefore, the Council's interest in 'guaranteeing the preservation of [Crescent Dune's] natural beauty,' . . . for public use is not the

type of interest which justifies intervention under Rule 24(a)." 36.96 Acres, 754 F.2d at 859.

Intervenors in the instant case present a weaker case for intervention that did the Save the Dunes Council. The Dunes Council had a 30 year commitment to the establishment of the Dunes, and had submitted affidavits that its members used the Indiana Dunes. 36.96 Acres, 754 F.2d at 861 (Cudahy, J., dissenting). Moreover, the Council had alleged that the plaintiffs failed to meet the third criterion of adequacy of representation in that "the Secretary, after a long delay, had abandoned efforts at acquisition in September 1983." 36.96 Acres, 754 F.2d at 862 (Cudahy J., dissenting). See also id. 754 F.2d at 859-60 (majority notes that the Council's allegations against the Secretary were

"of the type for which mandamus would provide a remedy.")

In the instant case, however, IPC's interests are more attenuated. IPC was incorporated only 5 years ago in 1980. Moreover, its purpose is essentially communicative and persuasive. IPC seeks to inform people about abortion and about IPC's preference for alternatives to abortion. IPC also seeks to lobby legislators so that its view on the protection of "the unborn" may become law. In an America whose freedom is secured by its ever vigilant guard on the openness of its "marketplace of ideas," IPC is encouraged to thrive, and to speak, lobby, promote, and persuade, so that its principles may become, if it is the will of the majority, the law of the land. Such a priceless right to free expression, however, does not also

suggest that IPC has a right to intervene in every lawsuit involving abortion rights, or to forever defend statutes it helped to enact. Rule 24(a) precludes a conception of lawsuits, even "public law" suits, as necessary forums for such public policy debates.

Moreover, the defendants in the instant case are ably representing HB 1399. The IPC suggests that it is the principal proponent of HB 1399, and that the defendants, while "honorably committed to their duty of defending duly enacted state legislation . . . cannot match the conviction and thorough knowledge of the subject area held by the proposed intervenors." IPC br. at 7. A subjective comparison, however, of the conviction of defendants and intervenors is not the test for determining adequacy of representation. Adequacy can be

presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor. United States v. South Bend Community School Corp., 692 F.2d 623 (7th Cir. 1982), Wade v. Goldschmidt, 673 F.2d 182, 186 n.7 (7th Cir. 1982). Moreover, we need not rely only on this presumption. The record in this case indicates that the named defendants charged by law with defending the laws of Illinois, see, e.g., Ill.Rev.Stat. ch. 14, ¶¶4, 5 (1983), have adequately defended this suit. IPC makes no allegations to the contrary. Thus, IPC's right to intervene in the instant lawsuit is even less substantial than was the Dune Council's asserted right to intervene, in terms of both interest and representation.

IPC's assertion of an interest in the protection of "unborn" children is also insufficient to justify intervention as of right. The Supreme Court has unequivocally ruled on the assertability of fetal rights. "The word 'person,' as used in the fourteenth amendment, does not include the unborn." Roe v. Wade, 410 U.S. 113, 158, 93 S.Ct. 705, 729, 35 L.Ed.2d 147 (1973). The state may not, therefore, assert any legitimate interest in potential life until the fetus has reached "viability," that is, until the fetus has the capability of "sustaining meaningful life outside the mother's womb." Id. at 163, 93 S.Ct. at 732. Furthermore, it is the state alone who can assert an interest in the unborn, and it can only assert that interest after viability. "[B]ecause the State cannot regulate or proscribe abortion during the

first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 69, 96 S.Ct. 2831, 2841, 49 L.Ed.2d 788 (1976). Thus, IPC has no legally protectable interest in asserting or protecting "unborn" children.

IPC's final asserted interest is the interest of its members in adopting fetuses who survive abortions. Four members of IPC have submitted signed affidavits to this court which state that they "stand ready, willing and able to adopt a child who survives an abortion, even if that child might be handicapped." (Affidavits of N. Coughlin. R. Rivera, J. Solms and K. Coughlin). IPC argues that the provisions of the Illinois abortion

law challenged by plaintiffs primarily concern the ability of the State to increase the chances of survival of aborted fetuses, and that they have an interest in defending this lawsuit as potential adoptive parents of these fetuses.

IPC's members' interest in adopting fetuses "born alive" after abortions is, while commendable, far too speculative an interest to support IPC's alleged right to intervene in this lawsuit. IPC's interest relies in part on 38 I.A.S. § 81-27 (1984) which provides that the physician performing an abortion which results in a live fetus must contact the Juvenile Court. Section 81-28 states that when the Juvenile Court finds "that a live born infant has resulted from a voluntary abortion, such an infant has been abandoned." Sections 81-27 and

81-28, however, were struck down as unconstitutional in Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979), and Wynn v. Scott, 449 F.Supp. 1302 (N.D.Ill. 1978) aff'd 599 F.2d 193 (7th Cir. 1979). Both Carey and Scott held that an abortion is not an automatic termination of parental rights on the part of the mother for any fetus "born alive" as a consequence of the abortion. "All parents have constitutionally protected rights to have custody of and to care for their children. . . . They must have adequate notice that the state proposes to remove the children, and an opportunity to prove their fitness as parents at a hearing." Wynn v. Scott, 449 F.Supp. 1302, 1323 (N.D.Ill. 1978); Wynn v. Carey, 599 F.2d 193, 195 (7th Cir. 1979), see also Doe v. Rampton, 366 F.Supp. 189 (D.Utah 1973). The Illinois legislature nonetheless

reenacted sections 81-27 and 81-28 in HB 1399. The precarious history of these statutes suggests that IPC's reliance on these statutes as an indication that fetuses born alive after abortions will be automatically available for adoption is foolhardy.

Even assuming some women will give up their aborted fetus for adoption, there would be few fetuses for IPC members to adopt. Women having abortions which result in fetuses "born alive" will be few because over ninety percent of all abortions are performed during the first trimester of pregnancy, the aborted fetuses of which will not be "born alive." Henshaw & O'Reilly, Characteristics of Abortion Patients in the United States, 1979 & 1980, 15 Family Planning Pespectives 10 (1983). IPC tacitly acknowledges this fact by focusing on the

likelihood of fetuses being born alive after 21 weeks, or during the third trimester, when Illinois women cannot have abortions unless necessary to preserve their life or health. IPC also acknowledges that live birth abortions are relatively few, amounting only to perhaps "400 to 500 abortion live births per year in the United States." IPC Br. at 14, (quoting Jeffries & Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, Aug. 2, 1981 at 14. col.2). Finally, even assuming that some Illinois women will produce a live fetus after an abortion and choose to give up the child for adoption, the outcome of this litigation will have no bearing on IPC's members' ability to adopt such a child. IPC's members will have to attempt such an adoption pursuant to the regulations and laws of the state

of Illinois, with which this litigation is unconcerned. Therefore, IPC cannot through this lawsuit protect any interest its members might have in adopting such children.

In summary, then, IPC has presented no direct and substantial interest that can be secured by its participation in this lawsuit. Neither its interests as lobbyist, guardian of fetal rights, nor potential adoptive parents of adopted fetus "born alive," either separately or together, support its right to intervene in this lawsuit. The district court's finding that IPC failed to establish a significant, legally protectable interest is, therefore, affirmed.

III

IPC also appeals the district court's denial of permissive intervention under Rule 24(b). Permissive interven-

tion is wholly discretionary with the district court and will be reversed on appeal only for an abuse of discretion. United States v. 36.96 Acres, 754 F.2d 855 (7th Cir. 1985). The district court denied permissive intervention because no statute of the United States conferred a conditional right to intervene and because IPC had "no direct claim or right in the case before the court." Plaintiffs' Ex.A. at 3-4. The court also denied intervention in order "to avoid any possible undue delay or prejudice to the parties." Plaintiffs Ex.A. at 3-4. The district court did not abuse its discretion in so ruling and we therefore affirm its denial of permissive intervention.

In concusion, for the reasons stated ahove, the district court's orders denying IPC intervention as of right and

permissive intervention are affirmed.

AFFIRMED.

CUDAHY, Circuit Judge, concurring in the result.

I dissented in United States v. 39.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), to which the majority refers. This was a decision which, though perhaps defensible on narrowly technical grounds, excluded the one party--the Save the Dunes Council--which had a clear commitment to the acquisition of Crescent Dune for the Indiana Dunes National Lakeshore (which was the subject of the lawsuit). That the Department of the Interior, the agency charged with the duty of conducting that suit, had any such commitment was at best dubious on the record as presented.

The case before us is not so clear; the named defendants appear to be

adequately defending HB 1399. But in some ways this case presents issues similar to those presented in 36.96 Acres. The Illinois Pro-Life Coalition has an intense and expert interest in the issues involved in this litigation. As the majority notes, the Coalition, like the Save the Dunes Council, is a "lobbyist," although I see nothing pejorative in the use of that term in the present context. In fact, its use suggests to me that the public interest organization in question knows enough and cares enough about the issues involved to litigate them productively.

I agree with the Coalition that the interest factor must be broadly construed in "public" cases like this one. The majority has been good enough to cite the authority, both scholarly and judicial, for that proposition. But I do not agree

with the majority that IPC's interests are more attenuated than those asserted by the Save the Dunes Council, and are insufficient to support intervention. The fact that IPC cannot be an original defendant to the constitutional challenge to HB 1399 does not entail that it does not have standing to intervene. See 36.96 Acres, 754 F.2d at 860-862 (Cudahy, J., dissenting) (citing cases). The interest in adopting live-born fetuses had by some members of IPC seems to me to be comparable to the interest in using acreage added to the Indiana Dunes National Lakeshore had by members of the Save the Dunes Council. Here it is important that the Council [sic] has a special concern for fetuses that survive abortion and stand in need of adoption. It is impossible to overstate the fundamental importance of this and related issues of

life and death in this case.

There has been no showing that this lawsuit would be in any way encumbered by allowing the Council to intervene. The public interest in wise resolution of difficult and important issues presented by this lawsuit would clearly be furthered by such participation. However, since the defense of HB 1399 has not been shown to be inadequate, I am constrained to concur in the result; the circumstances here, although highly persuasive, are not sufficiently compelling to mandate intervention as of right.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 5602

Louis G. KEITH, M.D., et al.,
Plaintiffs,

v.

Richard M. DALEY, et al.,
Defendants,

Before the HON. JOHN A. NORDBERG,

Judge, on Friday, September 28, 1984,

at the hour of 10:30 o'clock, a.m.

PRESENT:

MS. COLLEEN K. CONNELL
MR. WILLIAM T. MC GRATH
MS. CONNIE L. PUCHALSKI
MR. RANDY KEMMER

THE CLERK: 84 C 5602, Louis G. Keith, et al., vs. Richard M. Daley, et al.

(In open court.)

* * *

THE COURT: All right. Let me just

say that I appreciate the arguments on both sides and this type of case, even though feelings do run very strong in this area, it is not really any different than many other cases of this general nature where this question is raised and, taking, anyway, all of these matters into account, the motion of the Illinois Pro-Life Coalition to intervene in this case is denied.

The Pro-Life Coalition has moved to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure and for permissive intervention under Rule 24(b) of the Federal Rules.

Now, first, the Court finds that the Pro-Life Coalition may not intervene as of right under Rule 24(a). Rule 24(a) permits intervention only when a statute of the United States confers a conditional right to intervene or when the appli-

cant claims an interest relating to the property or transaction which is the subject of the action and it is so situated that the dispostition of the action may, as a practical matter, impair or impede its ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Now, in this case I think that it is clear that no statute confers an unconditional right upon the proposed intervenors to intervene so the Pro-Life Coalition may not intervene under Rule 24(a)(1).

Rule 24(a)(2) requires a direct, significant legally protectable interest in the property or transactions involved in the action. And I would cite Wade vs. Goldschmidt, 673 Federal 2d 182 at 185. That's a Seventh Circuit 1982 case.

In this case, however, the Pro-Life Coalition has no such direct significant legally protectable interest. This action involves, rather, a constitutional challenge to a recently enacted Illinois law involving abortion and does not directly, or, as a practical matter, impair or impede any rights of the Pro-Life Coalition.

The Court also notes that the named defendants in this action can adequately represent any interests of the Pro-Life Coalition they may have. And it has been indicated here that they have customarily worked in cooperation with groups such as the Pro-Life Coalition and I am sure that they would do so in this particular case.

So, the Court therefore, finds that the Pro-Life Coalition may not intervene as a matter of right, again citing Wade

vs. Goldschmidt.

Now with respect to the permissive intervention under Rule 24(b), the Court finds that that is inappropriate in this particular case. Under Rule 24(b) permissive intervention may be granted within the discretion of the Court, again, (1) when a statute of the United States confers a conditional right to intervene or, (2) when an applicant's claim or defense in the main action have a question of law or fact in common.

Now, in exercising its discretion under this rule, the Court shall consider whether the intervention will unduly delay or prejudice the rights of the original parties. As I have already indicated, the statute does not confer any right to intervene on the Pro-Life Coalition.

Secondly, the Court finds that since

the Pro-Life Coalition has no direct claim or right in the case before the Court and since the parties agree that this matter should be resolved as expeditiously as possible and that we should proceed to a final disposition in this case as soon as possible, to avoid any possible undue delay or prejudice to the parties, the Court will exercise its discretion under Rule 24(b) to deny permissive intervention for the Pro-Life Coalition. However, the Court will permit the Pro-Life Coalition to file briefs with the Court as amicus curiae should the Pro-Life Coalition desire to do so, and I can assure the Coalition that the Court will carefully consider any briefs that they may choose to file in support of the position of the defendants.

So, accordingly, the motion for the

Illinois Pro-Life Coalition, then, to intervene as a defendant in this action is denied.

JUDGMENT--ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 18, 1985

Before
Hon. William J. Bauer, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge

Louis G. KEITH, M.D., et al.,
Plaintiffs-Appellees,

v.

Richard M. DALEY, State's Attorney for the County of Cook, Neil F. Hartigan, Attorney General of the State of Illinois and Fred H. Uhlig, Acting Director of Public Health of Illinois,
Defendants,

and

Illinois Pro-Life Coalition, Inc., III,
Intervening Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois Eastern Division

No. 84 C 5602
Judge John A. Nordberg

This cause came before the Court for decision on the record from the United

States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Hon. John A. Nordberg, Judge Presiding

No. 84 C 5602 Sept. 28, 1984

KEITH et al. v. DALEY, et al.

HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION and continued motions to intervene, to consolidate hearing with trial on the merits and for more definite statement.

ORDER

Hearing on motions held. Court grants proposed Intervenor's motion to permit late filing of reply brief. Court grants leave to file appearance of William T. McGrath on behalf of proposed intervenors for purposes of hearing on intervention only. Motion of Illinois Pro-Life Coalition, III, Inc. to intervene as a defendant is DENIED. Plain-

tiffs' Motion for Preliminary Injunction is continued generally. Defendants' Motion to consolidtate hearing with trial on the merits granted by agreement. Temporary restraining order is extended by agreement until further order of the Court. Defendants' Motion for a more definite statement is granted.

Plaintiffs to file amended complaint by October 12, 1984. Defendants to answer by November 2, 1984. Plaintiffs to file support memorandum on Motion to Maintain Class Actions to and including October 19, 1984. Defendants given to November 2, 1984 to respond. Reply to be filed Novmber 9, 1984. Ruling will be by mail. Status hearing continued to November 16, 1984 at 9:30 a.m.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 5602

Louis G. KEITH, M.D., et al.,
Plaintiffs-Appellees,

v.

Richard M. DALEY, State's Attorney for the County of Cook, Neil F. Hartigan, Attorney General of the State of Illinois and Fred H. Uhlig, Acting Director of Public Health of Illinois,
Defendants,

and

Illinois Pro-Life Coalition, Inc., III,
Intervening Defendant-Appellant.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF NANCY COUGHLIN

Affiant, Nancy Coughlin, being duly sworn on oath, deposes and states as follows:

1. I am a citizen of the State of Illinois, and a member of Illinois Citizens Concerned for Life, which is an

organizational member of Illinois Pro-Life Coalition, III, Inc.

2. I am a parent of three children. In April, 1984, I attempted to adopt a baby with Down's syndrome. The mother of that child subsequently decided to keep the baby. I have the love, time, and financial resources to care for and adopt a child.

3. As I understand them, Sections 5 (regulating post-viable abortions), 6(1) (requiring use of abortion methods least likely to kill the fetus in post-viable abortion), 6(2)(requiring the presence of a second doctor in post-viable abortions to aid the baby's survival), 6(3) (making it clear that the intentional killing of a child who is born alive is prohibited by the homicide code), 6(4) (requiring use of abortion methods least likely to kill the fetus when there is a possibil-

ity that the fetus is viable), and 6(8) (prohibiting abortions sought solely on account of the sex of the fetus), will all increase the likelihood that more children will survive abortion and be available for adoption.

4. I stand ready, willing, and able to adopt a child who survives an abortion, even if that child might be handicapped.

Respectfully submitted,

/s/
Nancy Coughlin

[Notarized 7/26/84]

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 5602

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v.

Richard M. DALEY, State's Attorney for the County of Cook, Neil F. Hartigan, Attorney General of the State of Illinois and Fred H. Uhlig, Acting Director of Public Health of Illinois,
Defendants,

and

Illinois Pro-Life Coalition, Inc., III,
Intervening Defendant-Appellant.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF RALPH RIVERA

Affiant, Ralph Rivera, being duly sworn on oath, deposes and states as follows:

1. I am a citizen of the State of Illinois, and a member of Illinois Citizens Concerned for Life, which is an

organizational member of Illinois Pro-Life Coalition, III, Inc.

2. I am a parent of two children, both of them adopted. I have the love, time, and financial resources to care for and adopt other children.

3. As I understand them, Sections 5 (regulating post-viable abortions), 6(1) (requiring use of abortion methods least likely to kill the fetus in post-viable abortion), 6(2)(requiring the presence of a second doctor in post-viable abortions to aid the baby's survival), 6(3) (making it clear that the intentional killing of a child who is born alive is prohibited by the homicide code), 6(4) (requiring use of abortion methods least likely to kill the fetus when there is a possibility that the fetus is viable), and 6(8) (prohibiting abortions sought solely on account of the sex of the fetus), will

all increase the likelihood that more children will survive abortion and be available for adoption.

4. I stand ready, willing, and able to adopt a child who survives an abortion, even if that child might be handicapped.

Respectfully submitted,

/s/
Ralph Rivera

[Notarized 7/30/84]

UNITED STATES DISTRICT COURT,
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EASTERN DIVISION

No. 84 C 5602

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Plaintiffs-Appellees,

v.

Richard M. DALEY, State's Attorney for the County of Cook, Neil F. Hartigan, Attorney General of the State of Illinois and Fred H. Uhlig, Acting Director of Public Health of Illinois,
Defendants,

and

Illinois Pro-Life Coalition, Inc., III,
Intervening Defendant-Appellant.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF JOAN SOLMS

Affiant, Joan Solms, being duly sworn on oath, deposes and states as follows:

1. I am a citizen of the State of Illinois, and a member of Family Life League, which is an organizational member

of Illinois Pro-Life Coalition, III, Inc.

2. I am a parent of two children, both of them adopted. I also care for two foster children. I have the love, time, and financial resources to care for and adopt other children.

3. As I understand them, Sections 5 (regulating post-viable abortions), 6(1) (requiring use of abortion methods least likely to kill the fetus in post-viable abortion), 6(2) (requiring the presence of a second doctor in post-viable abortions to aid the baby's survival), 6(3) (making it clear that the intentional killing of a child who is born alive is prohibited by the homicide code), 6(4) (requiring use of abortion methods least likely to kill the fetus when there is a possibility that the fetus is viable), and 6(8) (prohibiting abortions sought solely on account of the sex of the fetus), will

all increase the likelihood that more children will survive abortion and be available for adoption.

4. I stand ready, willing, and able to adopt a child who survives an abortion, even if that child might be handicapped.

Respectfully submitted,

/s/
Joan Solms

[Notarized 7/26/84]

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 5602

Louis G. KEITH, M.D., et al.,
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v.

Richard M. DALEY, State's Attorney for the County of Cook, Neil F. Hartigan, Attorney General of the State of Illinois and Fred H. Uhlig, Acting Director of Public Health of Illinois,
Defendants,

and

Illinois Pro-Life Coalition, Inc., III,
Intervening Defendant-Appellant.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF KATHY COUGHLIN

Affiant, Kathy Coughlin, being duly sworn on oath, deposes and states as follows:

1. I am a citizen of the State of Illinois, and a member of Illinois Citizens Concerned for Life, which is an

organizational member of Illinois Pro-Life Coalition, III, Inc.

2. I am a parent of four children, one of them adopted. I also care for two foster children. I have the love, time, and financial resources to care for and adopt other children.

3. As I understand them, Sections 5 (regulating post-viable abortions), 6(1) (requiring use of abortion methods least likely to kill the fetus in post-viable abortion), 6(2)(requiring the presence of a second doctor in post-viable abortions to aid the baby's survival), 6(3) (making it clear that the intentional killing of a child who is born alive is prohibited by the homicide code), 6(4) (requiring use of abortion methods least likely to kill the fetus when there is a possibility that the fetus is viable), and 6(8) (prohibiting abortions sought solely on

account of the sex of the fetus), will all increase the likelihood that more children will survive abortion and be available for adoption.

4. I stand ready, willing, and able to adopt a child who survives an abortion, even if that child might be handicapped.

Respectfully submitted,

/s/
Kathy Coughlin

[Notarized 7/26/84]

Supreme Court, U.S.
FILED
OCT 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-467

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ILLINOIS PRO-LIFE COALITION, INC., III,
Petitioner,

v.

LOUIS G. KEITH, M.D., et al.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUE PRESENTED FOR REVIEW

1. Whether the court of appeals properly found that proposed intervening defendant, Illinois Pro-Life Coalition, Inc., III ("IPC"), petitioner herein, whose stated organizational "interests" are lobbying and adopting children, failed to satisfy the requisites of Rule 24(a)(2), Fed.R.Civ.P., and thus could not intervene of right in a lawsuit where the only issue posed is whether a criminal abortion statute fails to conform to the Constitution of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ILLINOIS PRO-LIFE COALITION, INC., III,
Petitioner,

v.

LOUIS G. KEITH, M.D., et al.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

(See Petition for Certiorari)

JURISDICTION

(See Petition for Certiorari)

STATUTORY PROVISION INVOLVED

Rule 24(a)(2), Fed.R.Civ.P.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to invervene in an action:

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

Plaintiff-physicians, respondents herein, initiated this lawsuit pursuant to 42 U.S.C. § 1983, challenging the constitutionality of Illinois House Bill 1399 ("HB 1399").[1] HB 1399 would amend the Illinois Abortion Law of 1975, a criminal statute which regulates physicians who perform abortions.

The amendments contained in HB 1399 propose comprehensive regulation of the abortion decision, much of which contravenes *Roe v. Wade,* 410 U.S. 113 (1973), and its progeny, and include provisions which: declare that human life begins at conception (§ 2(6)); require physicians to provide written certification that an abortion was medically necessary (§ 3.1); require physicians to certify in writing the available abortion methods and the reasons for choosing the method used (§§ 6(1) and 6(4)); require physicians to elevate fetal life above that of the pregnant woman (§ 6(1)); require physicians to use "life-saving" abortion techniques upon non-viable fetuses (§ 6(4)); subject physicians to prosecution under the homicide laws for aborting non-viable fetuses (§ 6(3)); and, require physicians to inform their patients about "fetal pain," and to offer patients anesthetics for fetal pain (§ 6(6)). Plaintiff-physicians would stop performing abortions if HB 1399 goes into effect because of the criminal penalties it would impose. (Zbaraz affidavit at ¶ 3(f), Rosner affidavit at ¶ 4,

---

[1] Plaintiffs include Arthur L. Herbst, M.D., Chairman of the Department of Obstetrics and Gynecology at the University of Chicago, Pritzker School of Medicine, William Spellacy, M.D., Chairman of the Department of Obstetrics and Gynecology at the University of Illinois School of Medicine, David Zbaraz, M.D., a clinical professor of Obstetrics and Gynecology at the University of Chicago, Pritzker School of Medicine, and Louis G. Keith, M.D., a professor of Obstetrics and Gynecology at Northwestern University School of Medicine.

Keith affidavit at ¶ 3(b),(d), filed with Plaintiffs' Memorandum In Support Of A Temporary Restraining Order).[2]

Accordingly, plaintiff-physicians initiated this action challenging HB 1399 and named as defendants Attorney General Hartigan, States Attorney Daley, and the Acting Director of the Illinois Department of Public Health, the state officials charged with the duty of either enforcing the Illinois Abortion Law or defending its constitutionality. Under Illinois law, the duty for initiating prosecutions rests with the 102 State's Attorneys. Ill. Rev. Stat. ch. 14, ¶ 5 (1983). The Attorney General has the authority both to defend the constitutionality of a challenged state statute and to represent any other state official in federal court. Ill. Rev. Stat. ch. 14, ¶ 4 (1983).

Pursuant to Illinois law, neither proposed intervenor Illinois Pro-Life Coalition, III ("IPC") nor its individual members could be named as defendants because, as private parties, neither IPC nor its members could initiate criminal prosecutions under this criminal abortion law or defend the State of Illinois in federal court. Nonetheless, IPC sought leave to intervene in the district court as a party defendant, asserting the "interests" of its members in adopting children, lobbying for legislation that protects fetuses, and presenting alternatives to abortion. (IPC Petition at 7-8).[3] IPC claimed no authority to enforce or defend this criminal statute.

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[2] Nine of the statutory provisions amended by HB 1399 merely constitute reenacted and renumbered sections identical to provisions held unconstitutional and permanently enjoined in earlier litigation surrounding the Illinois Abortion Law. *Charles v. Carey*, 579 F. Supp. 377 (N.D. Ill. 1983), and *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part, rev'd in part, Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted, Diamond v. Charles*, No. 84-1379, ____ U.S. ____, 53 U.S.L.W. 3824 (May 20, 1985).

[3] Citations to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by IPC are referred to as the "IPC Petition at ____." Citations to the appendix attached to that Petition are referred to as "App. at ____"

Plaintiff-physicians invited IPC to participate as *amicus curiae* but opposed intervention because IPC failed to satisfy the requirements of either Rule 24 (a) or (b), Fed.R.Civ.P., namely: (1) IPC did not have a substantial protectable interest in the subject matter of this lawsuit; (2) IPC's "interests" in adoption and lobbying would not be impaired if it were not allowed to intervene as a party defendant; (3) IPC's "interests" in the constitutionality of HB 1399 were adequately represented by the State defendants; and (4) any delay caused by IPC's intervention would be undue and prejudicial. (Plaintiff-physicians' Memorandum In Opposition to Intervention at 2-20.) Both sides submitted briefs and presented oral argument to the district court.

The district court denied IPC intervention of right pursuant to Rule 24(a)(2). In support of this holding, the district court held that IPC asserted no direct, significant, legally protectable interest that would be impaired if IPC were denied intervention. (App. at 36.) Exercising its discretion, the district court also held that IPC could not intervene permissively pursuant to Rule 24(b)(2). (App. at 38.) The court expressly allowed IPC leave to file briefs as *amicus curiae,* advising IPC that the court would consider carefully any such briefs IPC filed. (App. at 38.).

The United States Court of Appeals for the Seventh Circuit affirmed, *Keith v. Daley,* App. at 1-32, holding that IPC could not satisfy the requirements for intervention under the Federal Rules of Civil Procedure.[4] Prior rulings of this Court and the express terms of Rule 24 support the Seventh Circuit's decision.

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[4] Petitioner does not raise, and thus waives, any objection to the court of appeals' decision that IPC was not entitled to permissive intervention pursuant to Rule 24(b)(2), Fed.R.Civ.P.

REASONS FOR DENYING CERTIORARI

I.

IPC HAS NO SIGNIFICANTLY PROTECTABLE INTEREST THAT WILL BE IMPAIRED IF IPC'S PARTICIPATION IN THIS LITIGATION IS LIMITED TO THAT OF AN *AMICUS CURIAE* RATHER THAN AN INTERVENING DEFENDANT.

Rule 24(a)(2) expressly sets forth four requirements which a proposed intervenor must satisfy before intervention of right is allowed: (1) the applicant's request must be timely;[5] (2) the applicant must have a direct, significant and protectable interest in the subject matter of the litigation; (3) the applicant's interest must be impaired by disposition of the action without the applicant's involvement; and (4) the existing parties do not adequately represent the applicant's interest. The applicant has the burden of proving each component; failure to establish even one component dictates that the motion to intervene be denied. *United States v. 36.96 Acres of Land,* 754 F.2d 855, 858 (7th Cir. 1985).[6]

As recognized by the Seventh Circuit, IPC failed to satisfy even one of these substantive requirements. The standards applied by the district court and the Seventh Circuit when performing the fact-specific evaluation of interest, impairment, and adequacy of representation are in full agreement with the

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[5] The timeliness of IPC's application for intervention is not in dispute here.

[6] The three substantive components of Rule 24(a)(2), interest, impairment, and inadequacy, "are not bright lines, but ranges—not all 'interests' are of equal rank, not all impairments are of the same degree, [and] representation by existing parties may be more or less adequate, . . ." *United States v. Hooker Chemicals & Plastics Corp.,* 749 F.2d 968, 983 (2d Cir. 1984). Thus, proper application of Rule 24(a)(2) requires that the three components be treated as different facets of the same problem. *Keith v. Daley,* App. at 8, *citing* 3B *Moore's Federal Practice* ¶ 24.07 [1] at 24-51 [2d ed. 1985]; *Hooker,* 749 F.2d at 983, *citing Moore's, supra.*

language and intent of Rule 24(a)(2) as interpreted by this Court and the majority of the circuit courts of appeal. IPC's proposed construction of Rule 24 would convert the federal courts into a sophisticated version of a college debating society, a result eschewed both by the precise terms of Rule 24 and Article III of the Constitution.

A. This Court And The Majority Of The Circuit Courts Require An Applicant To Establish A Direct And Protectable Interest To Justify Intervention Of Right.

Since the 1966 amendments to Rule 24, the Court has had opportunity to review the application of Rule 24(a)(2). *See, e.g., Donaldson v. United States,* 400 U.S. 517 (1971) ("*Donaldson*"); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967). Most recently in *Donaldson,* this Court stated explicitly that to intervene pursuant to Rule 24(a)(2), the applicant must assert "a significantly protectable interest." 400 U.S. at 531.

Consistent with the position of this Court, the Seventh Circuit articulated the "interest" requirement of Rule 24(a)(2) as demanding that the proposed intervenor demonstrate a direct, significant and legally protectable interest in the subject matter of the litigation before intervention would be allowed. *Keith v. Daley,* App. at 8. That interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit. *Keith v. Daley,* App. at 9. Contrary to IPC's contention, the Seventh Circuit in this case construed the interest requirement in a manner consistent with its prior holdings. *See, e.g., United States v. 36.96 Acres of Land,* 754 F.2d 855, 858 (7th Cir. 1985); *Wade v. Goldschmidt,* 673 F.2d 182, 185 (7th Cir. 1982), *citing Donaldson v. United States,* 400 U.S. 517, 531 (1971); *Heyman v. Exchange National Bank of Chicago,* 615 F.2d 1190, 1193 (7th Cir. 1980).

The circuit courts of appeal which have considered the issue, with the exception of the Ninth Circuit,[7] have adopted this construction of the interest requirement of Rule 24(a)(2). Neither the Ninth Circuit nor any other circuit has held that a general public policy interest, in the absence of an individual protectable interest, is sufficient to justify intervention of right. *See, e.g., Restor-A-Dental Lab v. Certified Alloy Prod.,* 725 F.2d 871, 874 (2d Cir. 1984)(applicant's interest must be "significantly protectable" and "direct, as opposed to remote or contingent"); *Westlands Water District v. United States,* 700 F.2d 561, 563 (9th Cir. 1983) (public policy interest insufficient to justify intervention); *Athens Lumber Co., Inc. v. Federal Election Comm'n,* 690 F.2d 1364, 1366 (11th Cir. 1982) ("intervention of right must be supported by 'direct, substantial, legally protectable interest in the proceeding' "); *United States v. Perry County Board of Education,* 567 F.2d 277, 279 (5th Cir. 1978), *quoting Diaz v. Southern Drilling Co.,* 427 F.2d 1118, 1124 (5th Cir.), *cert. denied,* 400 U.S. 878 (1970) ("interest element of Rule 24(a)(2) requires a 'direct, substantial, legally protectable interest' in the proceedings"); *Planned Parenthood v. Citizens for Community Action,* 558 F.2d 861, 869 (8th Cir. 1977) ("interest identified must be more than peripheral or insubstantial; the applicant must assert a 'significantly protectable interest' "); *Blake v. Pallan,* 554 F.2d 947, 953 (9th Cir. 1977) (impractical to base a finding of sufficient interest for intervention solely on public policy grounds); *Commonwealth of Pennsylvania v. Rizzo,* 530 F.2d

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[7] The Ninth Circuit has vacillated between applying a standard consistent with that adopted by this Court and a majority of the circuits, and the more liberal standard to which IPC clings in its Petition. *Compare Smith v. Pangilinan,* 651 F.2d 1320, 1324 (9th Cir. 1981), *quoting Donaldson v. United States,* 400 U.S. 517 (1971), (applicant "must show that he has a 'protectable interest' in the outcome the litigation of sufficient magnitude to warrant inclusion . . .") *with Washington State Bldg. & Const. Trades v. Spellman,* 684 F.2d 627, 630 (9th Cir. 1982) ("Rule 24 traditionally has received a liberal construction in favor of applicants for intervention"). If indeed there is an inconsistency in the standard applied by the Ninth Circuit, that is an issue for *en banc* consideration by that court. Rule 35(a), Fed.R.App.P.

501, 504 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976) (the party must have a "sufficient interest" in the matter that would be affected by the disposition); *Allard v. Frizzell,* 536 F.2d 1332, 1333 (10th Cir. 1976) ("interest asserted in the subject of the litigation must be a specific legal or equitable one"); *Nuesse v. Camp,* 385 F.2d 694, 699 (D.C. Cir. 1967) ("applicant for intervention must have an 'interest' in the 'transaction' which is the subject of the action"). *See also Avery v. Heckler,* 584 F. Supp. 312, 316 (D. Mass. 1984) ("interest required must be direct and substantive").

In summary, this Court and the circuit courts of appeal have required intervenors to make a vigorous showing of a significant and protectable personal interest. Intervention of right has not been allowed, and cannot be allowed, solely on the basis IPC asserts here—"interest" in a statute, *i.e.,* a public law, that is a matter of public concern.

B. The Seventh Circuit Correctly Held That IPC Failed To Assert A Direct and Protectable Interest That Would Allow Intervention Of Right Under Rule 24(a)(2).

Application of the "direct, significant and legally protectable" standard to the "interests" asserted by IPC confirms the Seventh Circuit's conclusion: IPC's "interest," the protection of fetal rights, the desire of IPC members to adopt children, and the championship of HB 1399 in the legislature, do not meet the interest requirement of Rule 24(a)(2) for intervention of right in this litigation. The only interest presented in the pending litigation is the constitutionality of a criminal statute. Thus, the "governmental bodies charged with compliance can be the only defendants." *Keith v. Daley,* App. at 14.

1. IPC has no authority—legal or otherwise—to assert fetal rights.

IPC has no legally protectable interest in protecting unborn children. *Keith v. Daley,* App. at 21-22. Although IPC may

share the interest of many Americans in the abortion issue, concern for the "rights" of the unborn is *not* a legally protectable interest. This Court has rejected unequivocally the argument that a fetus has constitutional rights. *Roe v. Wade,* 410 U.S. at 156-57. By contrast, the right of a woman to choose to have an abortion *is* a fundamental constitutional right which can be interfered with only upon a showing of a compelling state interest. *Roe,* 410 U.S. at 153.

Only after viability does the state's interest in potential life become compelling enough to justify limited regulation of the abortion process. *Roe,* 410 U.S. at 163-64. As noted by the Seventh Circuit, App. at 21-22, citing *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52 (1976), it is undisputed that the state, and *only* the state, can legally assert this interest in protecting viable fetal life. Thus, IPC has no legally protectable interest in asserting or protecting what it claims to be the right of the fetus to continued life. This Court must reject IPC's attempt to don the cloak of Fetal Guardian Ad Litem At-Large.

2. IPC's interest in adoption cannot be satisfied in these proceedings.

The Seventh Circuit also rejected IPC members' interest in adopting fetuses "born alive" after abortions as "too speculative" to satisfy Rule 24. *Keith v. Daley,* App. at 23. Women in Illinois cannot have abortions after the onset of viability unless necessary to preserve their life or health. Ill. Rev. Stat. ch. 38, ¶ 81-25 (1983). IPC's assumption that any surviving fetus would be available for adoption apparently relies upon another section of the Illinois Abortion Law which provides for the termination of parental rights in any fetus surviving an abortion. Ill.Rev.Stat. ch. 38, ¶¶ 81-27, 81-28 (1984). This section, however, has been struck down as unconstitutional. *Wynn v. Scott,* 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd,* 599 F.2d 193 (7th Cir. 1979). As noted by the Seventh Circuit, "[t]he

precarious history of these statutes suggests that IPC's reliance on these statutes as an indication that fetuses born alive after abortions will be automatically available for adoption is foolhardy." *Keith v. Daley,* App. at 25.

3. IPC's desire to continue its legislative activities is not an interest that can be asserted or protected in a judicial forum.

IPC contends that its third "interest"—that of the lobbyist behind HB 1399—is made cognizable by virtue of its interest in "the protection of unborn and newly born children and of its members' interests in adopting children who survive abortions." (IPC Petition at 27-28.) This is a classic example of bootstrapping. By necessity, it must fail here. IPC's interest as a lobbyist does not in itself meet the requisite interest standard. Nor does it meet that standard because IPC feels that it is important to participate as a party to protect its other non-litigable interests.

As held by the Seventh Circuit, an interest in legislative lobbying "is not a direct and substantial interest to support intervention in the instant lawsuit." *Keith v. Daley,* App. at 13. *See also United States v. 36.96 Acres of Land,* 754 F.2d 855 (7th Cir. 1985) (group which had lobbied for legislation authorizing acquisition of contested land denied intervention in condemnation suit brought by United States to acquire the land). The fact that IPC considers abortion "one of the most pressing and controversial public policy issues of our time" (IPC Petition at 11), does not mean that federal courts must afford party status with full rights of participation to any group which has taken part in the public debate in the legislative arena.[8]

The Illinois Abortion Law of 1975, as amended by HB 1399, would impose numerous restrictions upon plaintiff-

[8] Accepting the construction of interest advocated by IPC would mandate intervention of right for each of the numerous pro-choice individuals and groups who opposed the enactment of HB 1399.

physicians who perform abortions in the course of their practice of medicine and, as a matter of course, would restrict the rights of women who wish to terminate their pregnancies. Plaintiffs thus named as defendants the parties who are legally responsible for the enforcement of the Illinois Abortion Law and the defense of its constitutionality, the Illinois Attorney General and the Cook County State's Attorney. *Keith v. Daley,* App. at 14.

Obviously, plaintiff-physicians could not and did not name IPC as a defendant to this action. IPC bears no responsibility for enforcing or defending this criminal legislation. The desire of IPC to enact legislation supportive of the personal views of IPC members as to the beginning of life and the morality of abortion is not a legal issue, and obviously, is not an indispensable consideration for resolution of the merits of this lawsuit. As found by the Seventh Circuit, "Rule 24(a) precludes a conception of lawsuits, even "public law" suits, as necessary forums for such public policy debates." *Keith v. Daley,* App. at 19.

4. The generalized grievances raised by IPC will in no way be impaired by this litigation.

IPC's failure to assert a direct, significant and legally protectable interest necessarily undermines IPC's ability to satisfy the second substantive criteria demanded by Rule 24(a)(2)—impairment of interest. Impairment exists only if the resolution of a legal question would, as a practical matter, foreclose rights of the proposed intervenor in a subsequent proceeding. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.,* 683 F.2d 201, 204 (7th Cir. 1982).

IPC's foremost concern of protecting the "interests of unborn and newly born children" (IPC Petition at 38) cannot be impaired by this litigation, because as discussed above at pages 8-9, IPC has no legal authority to protect potential life.

IPC, moreover, can make no showing that more children will be "born alive" or that such children will be available for adoption if HB 1399 is upheld. Furthermore, judicial approval is necessary to effectuate every adoption. Ill. Rev. Stat. ch. 40, ¶¶ 1501 *et seq.* (1983). As found by the Seventh Circuit, a decision on the constitutionality of HB 1399 will have no impact on the eligibility of IPC's members to adopt children or on a juvenile court's decision approving any possible adoption proposed by one of IPC's members. *Keith v. Daley,* App. at 22-26.

IPC's additional concern that the issuance of a permanent injunction against HB 1399 would leave it "unable to protect its interests through future legislation or litigation" (IPC Petition at 29-30) does not merit serious consideration. Resolution of the merits of the *Keith* lawsuit, even without IPC's intervention, will not impair IPC's legislative maneuvering. The Illinois General Assembly has a protracted history of enacting restrictive abortion legislation, much of it drafted by IPC's counsel, without reference to federal court injunctions of existing Illinois anti-abortion legislation. *Charles v. Daley,* 749 F.2d 452, 458 (7th Cir. 1984), *prob. juris. noted, Diamond v. Charles,* No. 84-1379, ____ U.S. ____, 53 U.S.L.W. 3824 (May 20, 1985).

IPC's final concern that it would be precluded from protecting its "interests" in future litigation also lacks merit. As discussed above, IPC could not have been named as a defendant in this action. Nor is there any potential for future liability on the part of IPC. In short, IPC asserts no legally protectable interests that it has standing to protect. Therefore, IPC faces no impairment of its asserted litigation "rights."[9]

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[9] *See New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452, 473 (5th Cir.) (en banc), *cert. denied,* ____ U.S. ____, 105 S. Ct. 434 (1984) (leave to participate as *amicus* more appropriate than intervention when applicant lacks a legally protectable interest).

C. This Court Has Never Approved Intervention Of Right Absent A Vigorous Showing Of The Requisite Interest.

Despite the foregoing authority, IPC contends that a decision of this Court, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967) ("*Cascade*"), supports wide-spread intervention whenever a statute of interest to the public is at issue. IPC suggests that this Court in *Cascade* construed Rule 24 as approving a less rigorous standard of "interest" in cases involving a "public law" or "public interest." *Cascade* does not support this proposition.

First, both proposed intervenors in *Cascade*—the State of California and Cascade Natural Gas Corp.—had demonstrated a substantial economic interest in enforcement of this Court's earlier order directing the El Paso Natural Gas Company to divest itself of the Pacific Northwest Company. 386 U.S. at 132-36. Further, the State of California had a substantive right to be free of antitrust injury to its general economy. *Id. See also New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 466, n.28 (1984) (5th Cir.) (*en banc*), *cert. denied*, ____ U.S.____, 105 S.Ct. 434 (1984), *citing Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945). IPC asserts no such economic interest here. Second, this Court itself expressed substantial doubt as to the adequacy of the representation provided by the United States government in enforcing this Court's divestment order. *Cascade*, 386 U.S. at 136. *See also United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d at 986 n. 15. No such inadequacy has been shown here. See pages 19-22, *infra*.

Nowhere in *Cascade* did this Court identify a separate subcategory of litigation delineated "public law" cases for which a less stringent showing of litigable interest would be required. The sole reference to the term "public law" involved this Court's citation of *Missouri-Kansas Pipeline Co. v. United States*, 312 U.S. 502, 506 (1941) ("*Pipeline*"). The "public

law" involved in *Pipeline* was a Federal antitrust statute. In *Pipeline,* the consent decree between the United States and the Missouri-Kansas Pipe Line Company was drafted specifically to protect the economic independence of a private party—the Panhandle Eastern Pipe Line Company. When the government later sought modification of the consent decree, Panhandle was allowed to intervene to protect its private economic interests, which had been separately provided for in the consent decree.

The economic interests recognized as supporting intervention in the litigation of the "public laws" involved in *Cascade* and *Pipeline* are precisely the type of direct, significant and legally protectable interests required by Rule 24. Thus, IPC's citation of *Cascade* to support its proposition that a different standard for intervention exists when a case involves a statute, *i.e.,* a "public law," is not supported by either the facts or the holdings of these cases.

D. The Circuit Court Authority Cited By IPC Supports Neither A Different Interpretation Of The Interest Standard Than That Employed By The Seventh Circuit Nor IPC's Own Claim For Intervention Of Right.

IPC also attempts to build its argument for a less stringent interest standard in "public law" cases through a series of misleading statements about the conclusions drawn by several circuit courts of appeals. On closer review, these cases support respondents', and not IPC's position.

For example, in support of its claim for intervention, IPC cites two cases decided by the D.C. Circuit, *Natural Resources Defense Council v. Costle,* 561 F.2d 904 (D.C. Cir. 1977) ("*NRDC*"), and *Nuesse v. Camp,* 385 F.2d 694 (D.C. Cir. 1967) ("*Nuesse*"). Although the D.C. Circuit employed broad language when describing the requisite interest, its application of that requirement demanded the same direct and significant interest required by this Court and the other circuit courts of

appeal. See discussion, *supra,* at 6. Accordingly, despite IPC's carefully chosen language from *NRDC* and *Nuesse,* neither case supports IPC's contention that the Seventh Circuit erroneously applied Rule 24(a)(2).

At issue in *NRDC* was the Environmental Protection Agency's (EPA) regulation, under the Federal Water Pollution Control Act, of toxic discharges. Pursuant to a settlement agreed upon by the parties, the EPA was to promulgate regulations which would establish normal levels of pollutants, clean-up priorities and timetables on an industry-by-industry basis. Several chemical companies requested intervention, seeking to protect their economic interests by participation in the rule-making process by which the EPA would determine the applicable pollution standards. The D.C. Circuit, applying Rule 24(a)(2), necessarily found that the proposed intervenors asserted a strong economic interest that, undoubtedly, would have been impaired had intervention been denied.

A different but equally important litigable interest was raised in *Nuesse.* At issue there was whether the United States Comptroller for the Currency, acting under the National Bank Act, properly had issued a certificate granting a Wisconsin bank chartered by the Federal government, *i.e.,* a national bank, permission to open a branch bank near the plaintiff bank, which was chartered by the state of Wisconsin. The National Bank Act, in essence, made approval of branch banking by national banks contingent upon state law. At the time of the litigation, Wisconsin state law prohibited state chartered banks from branch banking. The Wisconsin Commissioner of Banks sought to intervene as a plaintiff. The D.C. Circuit approved intervention, holding that because Congress had specifically incorporated state law into the National Bank Act, a state official responsible for the construction and enforcement of the state law asserted the requisite "interest in a legal controversy involving the [federal] Comptroller . . . ." 385 F.2d at 700.

IPC also cites an opinion of the Second Circuit, *New York Public Interest Research Group v. Regents of University of State of New York*, 516 F.2d 350 (2d Cir. 1975)("*NPIRG*"), to support its argument that the Second Circuit has adopted a broad application of the "interest" requirement in public law cases. IPC's reliance again is misplaced. The intervenors in *NPIRG* were the Pharmaceutical Society of New York and three individual pharmacists. The Second Circuit granted them leave to intervene as defendants in an action brought by consumers to enjoin enforcement of a regulation which prohibited advertising the price of prescription drugs. As noted by that court, this regulation affects the economic interests of members of the pharmacy profession." *Id.* at 352. Thus, the pharmacists and the Pharmaceutical Society intervened not to protect the public interest, but rather to protect their own individual economic interests which would have been directly impaired by a holding that the regulation was unconstitutional. More recently the Second Circuit, in *Hooker*, 749 F.2d. 968, rejected the argument that *NPIRG* supported broad "public law" intervention. The court in *Hooker* refused intervention to four environmental groups in a hazardous waste disposal action initiated by the federal government.

Nor should this Court be mislead by IPC's citation of *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir.) (*en banc*), *cert. denied*, ____ U.S. ____, 105 S.Ct. 434 (1984) ("*New Orleans*"). In *New Orleans*, the Fifth Circuit *denied* intervention to a group of electric customers of the plaintiff utility company, including the City of New Orleans. Moreover, the court expressly stated that "we have never departed from" the standard that "intervention [of right] still requires a 'direct, substantial, legally protectable interest in the proceedings.' " *Id.* at 463, *quoting Hobson v. Hansen*, 44 F.R.D. 18, 24 (D.D.C. 1968). *See also Piedmont Heights Civic Club v. Moreland*, 83 F.R.D. 153 (N.D. Ga. 1979) (non-profit corporations organized to advance interests of City of Atlanta

denied intervention in suit challenging governmental failure to comply with federal statues when planning to increase capacity of interstate highway system).[10]

IPC's reliance upon *Planned Parenthood v. Citizens for Community Action,* 558 F.2d 861 (8th Cir. 1977), also is misplaced. Although this case is the paradigm of what IPC would call a public law case, its holding directly undermines IPC's argument. In *Planned Parenthood,* the Court allowed a neighborhood association and two couples residing in the vicinity of a proposed clinic to intervene in an action by Planned Parenthood challenging the constitutionality of an ordinance which prohibited it from building the clinic. These parties sought to intervene to defend the ordinance in order to preserve their property values. As noted by the court, " '[i]nterests in property are the most elementary type of right that Rule 24(a) is designed to protect.' " *Id.* at 869, *quoting Diaz v. Southern Drilling Corp.,* 427 F.2d 1118, 1124 (5th Cir.), *cert. denied,* 400 U.S. 878 (1970). Thus, intervention was based on a direct economic interest which the parties clearly had established might be impaired.

Similar economic interests were at stake in the Tenth Circuit cases cited by IPC. In *National Farm Lines v. I.C.C.,* 564 F.2d 381 (10th Cir. 1977), the proposed intervening defendants, common carriers operating under I.C.C. certificates, asserted economic interests that were directly affected by

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[10] In finding that proposed intervenors' generalized interest in the improvement of Atlanta did not meet the interest requirement of Rule 24(a)(2), the district court stated,

> The holding of the Court will not affect a statute which governs the movants' actions, nor will it directly alter contractual or other legally protectable rights of the organizations seeking intervention.

83 F.R.D. at 158. Likewise here, the criminal statute in question, HB 1399, does not govern IPC's actions, and a holding relating to its constitutionality will not directly alter contractual or other legally protectable rights of IPC.

the pending litigation. Plaintiff, National Farm Lines, an agricultural cooperative had sued the I.C.C., challenging the constitutionality of statutes and regulations which limited the extent to which agricultural cooperatives could engage in transportation for hire by motor vehicles in interstate commerce. If the cooperative succeeded in having the statute struck down, current I.C.C. licensees would have faced heightened competition, thereby directly threatening their economic well-being. As the court noted, "there can be no question about the existence of an interest on the part of the present petitioners." *Id.* at 384.

Again, in *Natural Resources Defense Council v. U.S. Nuclear Reg. Comm'n,* 578 F.2d 1341 (10th Cir. 1978), also cited by IPC, the Tenth Circuit illustrated the direct and substantial interest necessary to justify intervention of right under Rule 24(a)(2). Plaintiffs in *Natural Resources* challenged the attempt by governmental agencies to issue a license to United Nuclear for the operation of a uranium mill in New Mexico without first preparing environmental impact statements. A group of companies who were recipients of licenses and the American Mining Congress sought to intervene. Citing *Donaldson v. United States,* 400 U.S. 517 (1971) and *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967), the court held that the intervenors had a significantly protectable interest which might as a practical matter be impaired by the outcome of the litigation. If, as a result of the litigation, United Nuclear were required to file an environmental impact statement as a prerequisite to receiving a license, when the intervenors' licenses came up for renewal they, in all likelihood, also would be required to file such statements. Thus, the intervenors had a direct economic interest in the litigation.

In each of the cases IPC cites, the successful intervenors asserted an economic or other legally protectable interest. IPC asserts no such interest here. On the facts presented in this

litigation, the Seventh Circuit correctly set forth and applied the interest standard as that requirement has been construed by this Court and a majority of the circuit courts of appeal. Accordingly, IPC cannot support its Petition for a Writ of Certiorari.

II.

THE NAMED GOVERNMENTAL DEFENDANTS ADEQUATELY REPRESENT THE PURPORTED INTERESTS OF IPC.

Even assuming that IPC could meet the burden of establishing an interest, as a final precondition to intervention of right, Rule 24(a) requires the applicant to demonstrate that its alleged interests will not be adequately represented by existing parties. IPC can make no such showing here. As observed by the Seventh Circuit, "the [governmental] defendants are ably representing HB 1399." *Keith v. Daley,* App. at 19.

A court can presume adequacy of representation when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor. *United States v. South Bend Community School Corp.,* 692 F.2d 623, 628 (7th Cir. 1982), *citing Commonwealth of Pennsylvania v. Rizzo,* 530 F.2d 501, 595 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976); *United Nuclear Corp. v. Cannon,* 696 F.2d 141, 144 (1st Cir. 1982). The named defendants here have a statutory duty to make this defense. That defendants Hartigan and Daley may use different litigation tactics than those preferred by IPC does not overcome the presumption of adequacy. *United States v. South Bend Community School Corp.,* 692 F.2d at 628; *United States v. Board of School Comm'rs, Indianapolis, Ind.,* 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973). Nor is the presumption rebutted by the fact that IPC would insist on more elaborate pre-trial or pre-settlement procedures. *Hooker,* 749 F.2d at 968, 985.

The presumption of adequacy is enhanced when the would-be intervenors have the same ultimate objectives as a party to the existing suit. *State of Texas v. United States Dep't of Energy,* 754 F.2d 550, 553 (5th Cir. 1985); *Baker v. Wade,* 743 F.2d 236, 240-241 (5th Cir. 1984); *United States v. South Bend Community School Corp.,* 692 F.2d 623, 627 (7th Cir. 1982); *Environmental Defense Fund v. Higginson,* 631 F.2d 738, 760 (D.C. Cir. 1979); *United States Postal Service v. Brennan,* 579 F.2d 188, 191 (2d Cir. 1978); *Nuesse v. Camp,* 385 F.2d 694, 703 (D.C. Cir. 1967). The named defendants here have the same ultimate objective as IPC—defending the constitutionality of HB 1399.

IPC's self-serving contention that defendants Hartigan and Daley "cannot match the thorough knowledge of the subject area held by the proposed intervenor" (IPC Petition at 12) cannot be supported by any citation to the record below. Nor does it call into question the adequacy of the legal representation provided by the state defendants who have been party-defendants to at least six lawsuits challenging the constitutionality of Illinois abortion laws.[11] The Seventh Circuit thus properly rejected IPC's "inadequacy" argument, finding that "[a] subjective comparison however, of the conviction of

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[11] *Zbaraz v. Hartigan,* 763 F.2d 1532 (7th Cir. 1985), *appeal filed,* August 19, 1985; *Charles v. Daley,* 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted, Diamond v. Charles,* No. 84-1379, ____ U.S. ____, 53 U.S.L.W. 3824 (May 20, 1985); *Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979); *Wynn v. Carey,* 582 F.2d 1375 (7th Cir. 1979). *See also Keith v. Daley,* 84 C 5602 (N.D. Ill. 1984), and *Lifchez v. Hartigan,* No. 82 C 4324 (N.D. Ill. 1982). In each of these cases, the State has played an active role in attempting to uphold these laws. Thus, IPC's bold statement that "[t]he political nature of their office, the volatility of the abortion issue, and the complexity of the constitutional issues involved may make [state officials] unable or unwilling to vigorously and adequately defend the [abortion] statute" (IPC Petition at 13) is completely unfounded.

defendants and intervenors is not the test for determining adequacy of representation." *Keith v. Daley,* App. at 19.[12]

IPC cannot substantiate its further contention (IPC Petition at 30-33) that the Seventh Circuit's standard for evaluating "adequacy" contravenes this Court's decision in *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972)("*Trbovich*"). *Trbovich* involved a unique statutory-based action brought by the Secretary of Labor, pursuant to the Labor Management Reporting and Disclosure Act ("LMRDA"), to set aside an election of union officers. Only the Secretary of Labor could initiate LMRDA suits—private parties were barred by law from starting such actions—and LMRDA provided the exclusive remedy for charges of union election violations. 404 U.S. at 531. The Supreme Court found that LMRDA imposed two distinct and arguably conflicting duties upon the Secretary of Labor: the protection of the public interest in democratic union elections; and, the representation of individual union members enforcing rights against the union. *Id.* at 538-39. It was in the latter capacity that the government's representation proved inadequate under Rule 24. *Id.* Thus, the union member was allowed limited intervention to protect his personal rights against the union; he was *not* allowed to intervene in the context of protecting a public policy interest. *Id.*

Several recent decisions, which IPC neglects to discuss, have specifically refused to construe *Trbovich* as establishing a *de minimis* standard for demonstrating inadequacy of representation. *See, e.g., Hooker,* 749 F.2d 968 (2d Cir. 1984) (four environmental groups denied leave to intervene in a govern-

[12] Indeed, despite the opportunity to file an *amicus* brief when the State filed its brief urging the district court to find HB 1399 constitutional, IPC neither filed a brief nor advised the district court either of any additional arguments in support of HB 1399 or any inadequacies in the State's representation.

ment enforcement suit against a pollution hazard);[13] *Commodity Future Trading Comm'n v. Heritage Capital Advisory Services,* 736 F.2d 384 (7th Cir. 1984); *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452 (5th Cir.) (*en banc*), *cert denied,* 105 S.Ct. 434 (1984), and 694 F.2d 421 (5th Cir. 1983) (companion case) (consumer groups and city officials denied leave to intervene in action to enforce contract involving utility rates).

The Seventh Circuit correctly found that the named governmental defendants are adequately defending this suit and that IPC makes no supportable allegations to the contrary. *Keith v. Daley,* App. at 20. Thus, IPC has failed to satisfy the third substantive requirement of Rule 24(a)(2).

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[13] Petitioner distorts the facts when it states that its interpretation of *Trbovich* controls in the Second Circuit. (IPC's Petition at 19, citing *New York Public Interest Group v. Regents,* 516 F.2d 350 (2d Cir. 1975) (per curiam) ("NPIRG"). That position was flatly rejected in *Hooker.* As the Second Circuit noted, the *NPIRG* case made no mention of *Trbovich* or of a "minimal burden" but instead allowed intervention because the State was not acting as a *parens patriae* and had conceded its own inadequacy. *Hooker,* 749 F.2d at 987. Likewise *Metropolitan Life Ins. Co. v. Ditmore,* 729 F.2d 1 (1st Cir. 1984) and *Hoots v. Commonwealth of Pennsylvania,* 672 F.2d 1133, 1135 (3d Cir. 1982), do not support IPC's identity of interest standard. The First Circuit in *Ditmore* did not mention *Trbovich* and the Third Circuit in *Hoots* clearly stated that the intervenor has the burden of showing that its interests are "sufficiently different" from those of an existing party that the representative *cannot* defend the intervenor's interest.

CONCLUSION

Both the court of appeals and the district court correctly found that IPC did not satisfy the elements for intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. No conflict as to the appropriate standards for evaluating these elements has been shown. Thus, IPC's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 85-467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ILLINOIS PRO-LIFE COALITION, INC., III,

Petitioner,

v.

LOUIS G. KEITH, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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In The

Supreme Court of the United States

October Term, 1985

ILLINOIS PRO-LIFE COALITION, INC., III,

Petitioner,

v.

LOUIS G. KEITH, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This case presents significant questions relating to intervention of interested parties in the area of the constitutionality of abortion-related statutes. The issues of constitutional law raised in these cases are novel and complex. Your amicus supports the intervention petitions of groups who have expressed identifiable and specific legal interest in the area of abortion-related statutes.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI BECAUSE THE COURT OF APPEALS FAILED TO ACKNOWLEDGE THE DISTINCT INTERESTS OF THE PROPOSED INTERVENOR AND THE SPECIAL EXPERTISE OF COUNSEL FOR ILLINOIS PRO-LIFE COALITION, INC., III IN REPRESENTING THOSE INTERESTS.

The Illinois Pro-life Coalition, Inc., III (IPC), is a not-for-profit corporation whose By-Laws provide that it is organized to promote the basic human right to life through formulating, supporting and lobbying for legislation that provides protection for unborn children and to present alternatives to abortion and infanticide by supporting groups and individuals that offer such alternatives. In the case at issue, IPC was actively involved in the legislative process on behalf of House Bill 1399 which amended the Illinois Abortion Law of 1975.

In recent years, the Office of the Attorney General of the State of Illinois has been called upon to defend numerous challenges to the constitutionality of the Illinois Abortion Law of 1975, and various amendments thereto. This type of litigation involves serious legal issues which are the subject of great public debate and concern. The issues of constitutional law raised in these cases are invariably complex and novel, and, therefore, this Court can benefit by having parties with a wide range of interests present arguments in such cases. Because of the separate interests of various "pro-life" groups and to assure that the full range of arguments are heard by this Court, amicus still supports the intervention petitions of such groups who have desired to participate as parties. We

would also support the intervention of groups expressing contrary views if they too present a specific identifiable interest in the subject matter of a particular piece of litigation.

In the case at issue here, we supported the petition of the Illinois Pro-life Coalition, Inc., III to intervene in the case before the district court on at least two occasions. We believe that both the district court and the court of appeals erred in holding: 1) that IPC does not have a sufficiently different interest from that of the Attorney General to allow it to intervene in this litigation; and 2) that IPC's separate and distinct interests are adequately represented by this office.

The instant case presents issues that require special expertise in a complex and novel area of constitutional law. The public interest groups who consistently mount challenges to state regulation of abortion-related statutes are seasoned advocates in this field and have a strong personal commitment to their position. Each of the various groups supporting such regulatory legislation is equally expert and interested, but each holds a different opinion and represents a different interest. Therefore, each should be allowed to participate through intervention in litigation which will determine the constitutionality of laws with which they have strong identity. The holdings of this Court establish that the "interest" criteria for intervention pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure is to be broadly construed in public law cases such as this. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129 (1967).

Effective and fair litigation of the legal issues in the abortion controversy requires that appropriate groups or individuals on all sides of the abortion controversy who

petition to intervene be allowed to do so. This lawsuit is an archetype of public law litigation. One of the principal contenders in the struggle, the American Civil Liberties Union, is in court as the representative of abortion-performing doctors arguing that HB1399 is facially invalid. The other principal contender, IPC, provided each legislator with a detailed constitutional analysis of the bill prior to enactment and lobbied extensively in its favor. IPC has been involved in numerous cases across the country in which the constitutionality of abortion-related statutes have been in question. The involvement of such groups on both sides of the matter ensures a more thorough presentation of these complex legal issues before the trial court. In this case, the IPC should be allowed to intervene so that both the advocates and opponents of abortion who have expressed identifiable and specific legal interests will be fully represented.

Giving deference to one seeking access to this Court is not advocating the intervention of those with frivolous interests. However, eliminating those who fail to survive the procrustean rule places form over substance. Where intervention of a party does not delay the proceeding and that party has exhibited a concrete interest in the litigation, the party seeking intervention should be granted access. In fact, the case at issue here will benefit greatly from such an intervention.

CONCLUSION

For the foregoing reasons, your *amicus* respectfully submits that certiorari should be granted, and that the judgment of the court of appeals should be reversed so that IPC can be permitted to intervene in this case.

Respectfully submitted,

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